

EXHIBIT H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re SILICON STORAGE
TECHNOLOGY, INC., SECURITIES
LITIGATION

No. C 05-0295 PJH

THIS ORDER APPLIES TO:
ALL ACTIONS

**ORDER APPOINTING LEAD PLAINTIFFS
AND LEAD PLAINTIFFS' COUNSEL**

This is a consolidated securities fraud proposed class action. Plaintiffs allege that they bought shares of stock in Silicon Storage Technology, Inc. ("Silicon Storage"), in reliance on false or misleading statements made by the defendants, and that they suffered damages when the price of the stock fell after Silicon Storage's true financial condition became apparent.

The Private Securities Litigation Reform Act (PSLRA) provides that the district court shall select one or more lead plaintiffs to prosecute the action on behalf of the class. 15 U.S.C. § 78u-4(a)(3)(B)(i). The lead plaintiff or plaintiffs, in turn, select lead counsel. 15 U.S.C. § 78u-4(a)(3)(b)(v). On April 27, 2005, the court heard argument in connection with motions by four groups of plaintiffs in this action, each group seeking to be appointed lead plaintiff and to have their choice of counsel confirmed as lead plaintiff's counsel.

DISCUSSION

A. Legal Standard

The PSLRA provides that within 20 days after the date on which a securities class

United States District Court

For the Northern District of California

1 action complaint is filed,

2 the plaintiff or plaintiffs shall cause to be published, in a widely circulated
3 national business-oriented publication or wire service, a notice advising
members of the purported plaintiff class –

4 (I) of the pendency of the action, the claims asserted therein, and the purported
5 class period; and

6 (II) that, not later than 60 days after the date on which the notice is published, any
7 member of the purported class may move the court to serve as lead plaintiff of
the purported class.

8 15 U.S.C. § 78u-4(a)(3)(A)(i).

9 Any class member, regardless of whether he has filed a complaint, may move for
10 appointment as lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(I). Within 90 days of the published
11 notice, "the court . . . shall appoint as lead plaintiff the member or members of the purported
12 plaintiff class that the court determines to be most capable of adequately representing the
13 interests of class members (hereafter . . . referred to as the "most adequate plaintiff"). 15
14 U.S.C. § 78u-4(a)(3)(B)(i).

15 In selecting a lead plaintiff, the court must adopt a presumption that the most adequate
16 plaintiff in any private action is the person or group of persons that –

17 (aa) has either filed the complaint or made a motion [for designation as lead
plaintiff];

18 (bb) in the determination of the court, has the largest financial interest in the
19 relief sought by the class; and

20 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
Procedure.

21 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This presumption may be rebutted

22 only upon proof by a member of the purported plaintiff class that the
23 presumptively most adequate plaintiff –

24 (aa) will not fairly and adequately protect the interests of the class; or

25 (bb) is subject to unique defenses that render such plaintiff incapable of
adequately representing the class.

26 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

27 The Ninth Circuit has characterized these statutes as "provid[ing] a simple three-step
28 process for identifying the lead plaintiff" in a securities fraud case. In re Cavanaugh, 306 F.3d

1 726, 729 (9th Cir. 2002). The first step consists of publicizing the pendency of the action, the
 2 claims made, and the purported class period. Id. In the second step, the district court
 3 considers "the losses allegedly suffered by the various plaintiffs" before selecting a
 4 "presumptively most adequate plaintiff." Id. at 729-30. The court must view "the one who 'has
 5 the largest financial interest in the relief sought by the class' and [who] 'otherwise satisfies the
 6 requirements of Rule 23 of the Federal Rules of Civil Procedure' " as the "presumptive lead
 7 plaintiff." Id. At the third step, the court must "give other plaintiffs an opportunity to rebut the
 8 presumptive lead plaintiff's showing that it satisfies Rule 23's typicality and adequacy
 9 requirements." Id. at 730.

10 In Cavanaugh, the court cautioned that

11 a straightforward application of the statutory scheme . . . provides no occasion
 12 for comparing plaintiffs with each other on any basis other than their financial
 13 stake in the case So long as the plaintiff with the largest losses satisfies the
 14 typicality and adequacy requirements, he is entitled to lead plaintiff status, even
 if the district court is convinced that some other plaintiff would do a better job.

15 Id. at 732.

16 B. The Competing Plaintiffs and Their Arguments

17 The first group consists of Robert Erickson and Shin Sheng Lin ("Erickson/Lin").
 18 Erickson/Lin contend that they are the most adequate plaintiffs because they have the largest
 19 financial interest in the relief sought in this case. They claim that they sustained combined
 20 losses of \$760,041 in connection with their purchases of Silicon Storage stock.

21 The second group is the McNaught Group, consisting of Henry A. Ciccarone, Jr.; J.
 22 David McNaught; Shahr Yonay; and Parshan Singh Johal. They claim to have incurred
 23 combined losses of \$399,314.¹

24 Third is the Sundstrom Group, consisting of Robert Sundstrom, Geoffrey Thacker, and

25
 26 ¹ In their moving papers, the McNaught Group proposed themselves as a five-investor
 27 group of plaintiffs, with combined losses of \$447,741. At least one of the competing groups
 28 asserted that one member of the group, Steven Kroff, a California attorney, was previously
 suspended from the practice of law for three years because of failure to perform legal services
 competently and because of several acts of moral turpitude. In their reply brief, the McNaught
 Group state that Kroff has withdrawn his request to be considered as a lead plaintiff.

1 Robert Bunting. They claim to have incurred combined losses of \$349,439.

2 Fourth, the Louisiana Funds Group, consisting of the Louisiana School Employees'
3 Retirement System (LSERS) and the Louisiana District Attorneys' Retirement System
4 (LDARS), claim to have incurred combined losses of approximately \$348,142.

5 The members of each of these four groups argue that they are the most adequate and
6 that the other groups are not adequate or are not typical.

7 Erickson/Lin's Arguments

8 Erickson/Lin argue that they have the largest total financial interest – \$760,041 – and
9 that their individual respective losses of \$369,749 and \$390,292 are larger than the individual
10 losses suffered by any of the other movants. Based on the amount of their losses, they assert
11 that they are the most adequate plaintiffs.

12 The McNaught Group's Arguments

13 The members of the McNaught Group contend that despite reporting the largest
14 financial interest in the litigation, Erickson/Lin are not entitled to the presumption of most
15 adequate plaintiff because they failed to properly document their financial interest as required
16 by the PSLRA.² The McNaught Group also assert that both members of Erickson/Lin are "in
17 and out" ("in/out") traders who sold their entire investment in Silicon Storage stock before the
18 end of the proposed class period.³ The McNaught Group argue that Erickson/Lin cannot meet
19 the "typicality" requirement of Federal Rule of Civil Procedure 23 and cannot adequately
20 represent the class because they are subject to the unique defenses that they were not

21 _____
22 ² The PSLRA requires a plaintiff to set forth all transactions in the subject security.
23 Erickson and Lin apparently stated the number of shares of stock they purchased, but cited a
24 price that was slightly more or slightly less than the price at which the stock was trading on the
date of the sale. Thus, according to the McNaught Group, Erickson/Lin did not "properly
document" their financial interest and cannot be the most adequate plaintiff.

25 ³ An in/out trader is one who both purchases and sells stock during the same period of
26 alleged price inflation. Unlike the typical "retention" trader who holds his or her securities
27 throughout the class period, an in/out plaintiff recoups at least some of the loss incurred by the
purchase because he both buys and sells during the period of price inflation. Thus, in awarding
28 damages, a court will subtract from his calculated injury upon purchase, the amount of his
recoupment at the time of sale. See Welling v. Alexy, 155 F.R.D. 654, 661 (N.D. Cal.1994).

1 harmed by defendants' fraudulent conduct, and that they cannot establish loss causation.

2 The McNaught Group contend that the motions of the Sundstrom Group and the
3 Louisiana Funds should be denied because they each report substantially smaller losses than
4 the McNaught Group. They also assert that Warren D. Ponder and E. Pete Adams, the
5 signatories of certifications submitted by the two Louisiana Funds, have not properly
6 demonstrated that they are authorized to file a lead plaintiff motion on behalf of the Funds.
7 They argue in addition that the Louisiana Funds' motion should be denied because one of the
8 Funds – LSERS – has been appointed as lead plaintiff in at least 19 federal securities actions
9 in the past three years, and is therefore barred from serving as a lead plaintiff in a PSLRA suit
10 under 15 U.S.C. § 78u-4(a)(3)(B)(vi).

11 The Sundstrom Group's Arguments

12 The Sundstrom Group argue that they are the most adequate plaintiffs because the two
13 groups with losses that are larger – Erickson/Lin and the McNaught Group – are not adequate
14 or typical. They assert that both Erickson and Lin were in/out traders, and are therefore
15 subject to the unique defense that they cannot establish a causal connection between the
16 alleged deceptive acts and the injury they allegedly suffered as a result. In addition, they
17 assert that Robert Erickson is disqualified from being a lead plaintiff because he is a "net
18 seller" who profited as much as \$138,837 from his investments in Silicon Storage.

19 They also argue that McNaught Group member Ciccarone and Louisiana Funds
20 member LDARS must each be disqualified from lead plaintiff consideration because they are
21 in/out traders, and will therefore have difficulty proving loss causation. Thus, they assert, if the
22 claimed losses of the various in/out traders are deducted from the total losses of their
23 respective groups, the losses of the each of the other three groups are less than the losses of
24 the Sundstrom Group.

25 The Louisiana Funds' Arguments

26 The Louisiana Funds argue that Erickson/Lin cannot be adequate lead plaintiffs
27 because they are net sellers of Silicon Storage stock. According to the Louisiana Funds,
28 Erickson/Lin purchased a total of 286,174 shares of Silicon Storage during the proposed

1 class period, and sold 342,174 shares during the class period.

2 The Louisiana Funds also argue that while the McNaught Group may have a larger
3 aggregate loss, they do not have a single individual with losses comparable to the losses of
4 the two Louisiana Funds. The Funds contend that it would defeat the purpose of the PSLRA
5 to allow five aggregating individuals to defeat two institutional investors from being lead
6 plaintiffs, especially when one of the institutional plaintiffs has the largest single loss of any
7 proposed lead plaintiff. They also contend that when members of an unrelated group such as
8 the McNaught Group, assembled by counsel, serve as lead plaintiffs, the result is attorneys
9 selecting clients, rather than clients selecting attorneys.

10 Erickson/Lin's Reply

11 In their reply brief, Erickson/Lin contend that they should not be disqualified because
12 they made "minor" and "immaterial" clerical errors in their loss calculations. With regard to the
13 argument that Erickson is not an appropriate lead plaintiff because he sold a substantial
14 number of shares prior to the end of the proposed class period, Erickson/Lin respond that the
15 "net seller" argument is irrelevant because courts nowadays use the FIFO ("first-in/first-out")
16 accounting approach rather than offsetting gains realized from such trades against class
17 period losses.

18 They also assert that under controlling Ninth Circuit law, class members who purchase
19 at inflated prices, but sell prior to the end of the class period, can still be proper class
20 representatives, and argue that district courts in this Circuit regularly certify classes containing
21 in/out members. Finally, they contend that Erickson/Lin would best represent the class
22 because they are knowledgeable and sophisticated investors, Erickson having multiple
23 graduate degrees, and having worked in the securities industry for more than a decade, and
24 Lin having extensive professional experience in the high-tech industry and having served on
25 the boards of directors of several technology companies.

26 With regard to the other three groups, Erickson/Lin contend that the McNaught Group
27 should not be appointed lead plaintiff because they are seeking to appoint two law firms as
28 lead plaintiffs' counsel, which Erickson/Lin assert creates a huge potential for duplicative

1 services.

2 Erickson/Lin argue in addition that the Louisiana Funds are presumptively barred from
3 serving as lead plaintiff in this action because LSERS has been a lead plaintiff in more than
4 five securities fraud actions in the past three years. Erickson/Lin also contend that while
5 institutional investors may be favored as lead plaintiffs, the courts nonetheless should not give
6 preference to institutional investors when there are other individual investors with larger
7 financial losses.

8 Finally, Erickson/Lin argue that the Sundstrom Group's losses are much smaller than
9 those suffered by Erickson/Lin.

10 The McNaught Group's Reply

11 The McNaught Group argue that they are the presumptive most adequate plaintiffs
12 because they have the largest documented financial interest and have demonstrated that they
13 are otherwise adequate and typical. They claim that Erickson/Lin have failed to accurately
14 certify their transactions in Silicon Storage securities or to explain how they calculated
15 Erickson's and Lin's pre-class period purchases and post-class period sales so that the court
16 can determine their financial interest in this litigation. The McNaught Group also argue that
17 Erickson/Lin are atypical because both members are subject to the unique defense that they
18 are net sellers – asserting that during the proposed class period, Erickson sold 50,000 more
19 shares of Silicon Storage stock than he purchased, and Lin sold 6,000 more shares than
20 he/she purchased, and that Erickson made a profit of \$138,837 on his class period
21 transactions.

22 The McNaught Group contend that not all their members are subject to the unique
23 defenses that apply to Erickson/Lin, and that they are therefore more adequate to represent
24 the interests of the class than Erickson/Lin. They also assert that they are the “most diverse”
25 group of investors, and are therefore best suited to ensure that the interests of all class
26 members will be protected. While one member of the group – Henry Ciccaroni – sold all his
27 shares before the end of the proposed class period, the other members retained a total of
28 64,500 shares. Thus, they argue, they can adequately represent both the interests of class

1 members who retained shares through the end of the class period and the interests of those
2 who did not.⁴

3 The McNaught Group contend further that the Sundstrom Group and the Louisiana
4 Funds each report a financial interest smaller than the interest of the McNaught Group, and
5 that the motions of those plaintiffs should be denied.

6 The Sundstrom Group's Reply

7 The Sundstrom Group reiterate that although two groups – Erickson/Lin and the
8 McNaught Group – claim larger financial losses than the Sundstrom Group, both of the
9 members of Erickson/Lin and one member of the McNaught Group (Ciccarone, the McNaught
10 Group member with the largest number of shares and the largest losses) are in/out traders
11 who are subject to unique defenses and therefore do not meet the requirements of Rule 23.
12 They also assert that one of the members of the Louisiana Funds – LDERS – is an in/out
13 trader, subject to the same defenses.

14 Thus, the Sundstrom Group argue, the claimed losses should be recalculated as
15 \$349,439 for the Sundstrom Group (no ineligible members); \$258,107 for the McNaught
16 Group (subtracting Ciccarone's losses);⁵ \$104,829 for the Louisiana Funds (subtracting
17 LDERS' losses);⁶ and \$0 for the Erickson Group (subtracting both Erickson's and Lin's
18 losses). The Sundstrom Group contend that they should be appointed lead plaintiffs because
19 they have the largest financial losses under this recalculation.

20 The Louisiana Funds' Reply

21 In response to the McNaught Group's claim that Warren Ponder and E. Pete Adams
22 are not authorized to file a lead plaintiff motion, the Louisiana Funds provide declarations
23

24 ⁴ In the alternative, the McNaught Group indicated at the hearing on these motions that
25 Ciccarone might withdraw from the group, leaving a group of three investors with a total of
26 \$209,680 in losses (without Kroff's losses) and no in/out members.

27 ⁵ This is \$209,680 without Kroff's losses.

28 ⁶ The Sundstrom Group also asserts that the other member of the Louisiana Funds –
LSERS – is statutorily barred from serving as lead plaintiff because it has been a lead plaintiff
more than the number of times permitted by the statute.

1 showing that Ponder has been authorized by the LSERS Board of Trustees to enter into
2 litigation on behalf of that fund, and that Adams has been authorized by the LDARS Board of
3 Trustees to enter into litigation on that Fund's behalf. In support, they also submit a notice of
4 filing of amended certification.

5 The Louisiana Funds also dispute the McNaught Group's claim that LSERS is a
6 "professional plaintiff" that has been appointed a lead plaintiff in 19 securities actions in the
7 past three years, asserting that the actual number is five times. Moreover, the Funds assert
8 that this fact does not disqualify LSERS from serving as a lead plaintiff in this case, noting that
9 while the statute provides that a person may be a lead plaintiff "in no more than 5 securities
10 class actions . . . during any 3-year period," the rule is qualified by the provision "[e]xcept as
11 the court may otherwise permit, consistent with the purposes of this section." See 15 U.S.C.
12 § 78u-4(a)(3)(B)(vi). The Louisiana Funds argue that the legislative history shows Congress'
13 intent that the court allow an institutional investor to exceed this five-in-three rule because
14 institutional investors do not qualify as the type of "professional plaintiff" to which the rule was
15 intended to apply.

16 With regard to the argument that LDARS, as an in/out trader, should not be appointed
17 lead plaintiff because it is subject to unique defenses, the Louisiana Funds simply respond
18 that this is not be considered a fatal defect in the Ninth Circuit in appointing lead plaintiffs. In
19 support they cite a decision from the Central District of California, In re Gemstar-TV Guide Int'l
20 . Inc. Sec. Litig., 209 F.R.D. 447, 453-54 (C.D. Cal. 2002), where the court rejected the
21 argument that in/out traders cannot be lead plaintiffs and noting that "many courts have
22 rejected this argument." The Louisiana Funds assert that the fact that LDERS is paired with
23 LSERS will assure that the interests of both in/out plaintiffs and retention plaintiffs are
24 adequately represented in this suit.

25 Finally, the Louisiana Funds argue that each of the other groups competing to be
26 named lead plaintiff is no more than a "mere assemblage of unrelated persons who share
27 nothing in common" other than having suffered losses in connection with purchases of Silicon
28 Graphics stock, and having entered into retainer agreements with the same attorney. The

1 Louisiana Funds contend that none of the three competing groups can be considered "a
2 person or group of persons capable of serving as lead plaintiff" because they are not part of a
3 cohesive group and have no pre-litigation relationship. The Funds describe the claims of
4 those three groups as simply an "aggregation of disparate losses cobbled together from
5 unrelated individuals who happened to have answered a press release by their proposed
6 counsel."

7 C. Analysis

8 In the present case, there is no dispute that plaintiffs in the first-filed action complied
9 with the publication requirement and the lead plaintiff motions were all filed no later than 60
10 days following the published notice in the first-filed action. There is also no dispute that one of
11 the plaintiff groups – Erickson/Lin – claim a substantially greater total loss than do the other
12 three groups. Thus, the first question is whether Erickson/Lin have demonstrated the "largest
13 financial interest in the relief sought by the class."

14 The PSLRA provides that the financial interest in the outcome of the litigation is
15 reasonably representative of the ability of a party or parties to function as lead plaintiff. See
16 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This comports with the overall focus of the PSLRA to place
17 securities litigation in the hands of investors, not lawyers. See Armour v. Network Assocs.,
18 Inc., 171 F.Supp. 2d 1044, 1048 (N.D. Cal. 2001) (legislative history of PSLRA reveals that
19 above provisions were motivated by Congressional concerns about prevalence of "lawyer-
20 driven" securities class actions) (citing H.R. Conf. Rep. No. 104-369, 104th Cong. 1st Sess.
21 (1995), at *31, reprinted in 1995 U.S.C.C.A.N. 730). As such, institutional lead plaintiffs are
22 preferred, though not required. Id.

23 The PSLRA provides no guidance concerning the method of ascertaining which
24 plaintiff has the "largest financial interest." See 15 U.S.C. 78u-4(a)(3)(B)(iii)(I)(bb). Nor has
25 the Ninth Circuit set forth any mandatory formula to be used when calculating financial interest.
26 See Cavanaugh, 306 F.3d at 730 n. 4 ("[T]he court may select accounting methods that are
27 both rational and consistently applied").

28 Some district judges, including at least three from this District, have equated "largest

1 financial interest" with the amount of potential recovery. See Weisz v. Calpine Corp., 2002
 2 WL 32818827 at *5 (N.D. Cal., Aug. 19, 2002) (Armstrong, J.); In re Critical Path, Inc. Sec.
 3 Litig., 156 F.Supp. 2d 1102, 1107-08 (N.D. Cal. 2001) (Orrick, J.); In re Network Assocs., Inc.,
 4 Sec. Litig., 76 F.Supp. 2d 1017, 1030 (N.D. Cal.1999) (Alsup, J.). Under this approach, the
 5 Court considers the "number of net shares purchased during the class period" coupled with
 6 the "losses suffered by selling shares during the class period." Critical Path, 156 F.Supp. at
 7 1108.⁷ This approach assumes that the amount by which the price of the stock was inflated
 8 because of the alleged misrepresentations stayed constant throughout the class period. Id. at
 9 1107-08 (citing In re Network Assocs., 76 F.Supp. 2d at 1027).

10 Erickson/Lin assert that they purchased approximately 286,174 shares of stock in
 11 Silicon Storage, and they claim to have sustained losses of approximately \$760,041. These
 12 numbers are higher than the purchases and losses claimed by the competing groups.
 13 Accordingly, the court finds that Erickson/Lin are presumptively the most adequate plaintiffs.⁸

14 Once the court has determined the plaintiff with the greatest financial stake in the
 15 lawsuit, it "must then focus its attention on that plaintiff and determine, based on the
 16 information he has provided in his pleadings and declarations, whether he satisfies the
 17 requirements of Rule 23(a), in particular those of 'typicality' and 'adequacy.'" Cavanaugh, 306
 18 F.3d at 730 (emphasis in original). The presumption that a plaintiff is the most adequate
 19 plaintiff can be rebutted only by a showing either that the plaintiff will not adequately and fairly
 20 protect the class, or by a showing that the plaintiff is subject to unique defenses and is
 21 therefore incapable of adequately representing the class. See id. at 729-30.

23 ⁷ Other courts have employed an approach that considers four factors: (1) the number of
 24 shares purchased during the class period, (2) the number of net shares purchased during the
 25 class period, (3) the total net funds expended during the class period, and (4) the approximate
 loss suffered during the class period. See, e.g., In re Olsten Corp. Sec. Litig., 3 F.Supp. 2d 286,
 296 (E.D.N.Y.1998), cited in In re Critical Path., 156 F.Supp. 2d at 1107.

26 ⁸ The court bases this determination on Erickson/Lin's claimed loss, and takes no position
 27 regarding whether Erickson/Lin is a "net seller" or whether the appropriate accounting method is
 28 First-in/First-out, or Last-in/Last-out, or some other method. From the perspective of the
 argument advanced by the Louisiana Funds, of course, this finding does not reflect "the amount
 of potential recovery."

1 Erickson/Lin argue that they satisfy Rule 23's typicality and adequacy requirements.
2 The competing plaintiff groups argue, however, that Erickson/Lin cannot adequately represent
3 the class because both members of the group are in/out sellers and thus subject to unique
4 defenses.

5 Some courts have found in/out sellers to be inadequate class representatives. For
6 example, in In re Microstrategy, Inc., Sec. Litig., 110 F.Supp. 2d 427 (E.D. Va. 2000), the
7 court noted that one party was not viable as a lead plaintiff because his status as an in/out
8 trader made him potentially subject to a unique defense based on the timing of his sales. Id.
9 at 437 n. 23. However, there does not appear to be a per se rule against having an in/out
10 trader as a class representative, at least among courts within the Ninth Circuit. See Welling,
11 155 F.R.D. at 661-62.

12 In Welling, Judge Orrick noted that while a court may have some misgivings about
13 having an in/out trader as a class representative, this did not mean such a person could not
14 serve as a class representative, adding that the Ninth Circuit has upheld certification of
15 classes containing both in/out and retention traders. See id. (citing Blackie v. Barrack, 524
16 F.2d 891 (9th Cir.1975); Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1437 (9th
17 Cir.1987) ("because market forces are independent of corrective disclosures, an in-and-out
18 trader . . . may suffer recoverable damages under the out-of-pocket rule even in the absence
19 of corrective disclosures")). He also noted, however, that a potentially more serious problem
20 with in/out traders is that proving reliance is made more difficult. See id. at 661 ("If . . . the
21 class was fooled into purchasing Cirrus stock until the disclosure of accurate, but adverse
22 information at the end of the class period . . . then it appears [plaintiff] was not duped because
23 he sold much of his Cirrus stock before the late April disclosure.").

24 Based on this analysis, the court finds that Erickson/Lin, the presumptive lead plaintiff
25 based on the amount of the group's claimed losses, would not be the most adequate plaintiff
26 on balance because both members of this group are in/out traders, and as such, are
27 potentially subject to unique defenses.

28 Of the three remaining groups, the McNaught Group claim the largest amount in losses

1 – \$399,314. The Sundstrom Group claim the second largest amount, with \$349,439. The
 2 Louisiana Funds are last (though close to the Sundstrom Group), with \$348,000. All members
 3 of the various groups now claim that they have a close and cohesive working relationship, that
 4 they are willing and able to represent the interests of the class. However, the Louisiana Funds
 5 argue that neither the McNaught Group nor the Sundstrom Group should be appointed lead
 6 plaintiff because both groups consist of unrelated individuals assembled into groups by
 7 counsel.

8 Based on its review of the papers submitted by the parties and on the arguments
 9 presented at the hearing, the court agrees with the Louisiana Funds that both the McNaught
 10 Group and the Sundstrom Group consist of unrelated individuals or entities with no preexisting
 11 relationship, who have been “grouped” together by their respective attorneys, arguably with an
 12 eye toward assembling the “group” with the largest total financial losses.

13 The PSLRA itself states that the plaintiff can be a person or group of persons. See 15
 14 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The Ninth Circuit has not determined what constitutes a “group”
 15 under the PSLRA. Some courts have simply allowed any group of investors to aggregate their
 16 claims for purposes of being appointed lead plaintiffs. See, e.g., In re American Bank Note
 17 Holographics, Inc. Sec. Litig., 93 F.Supp. 2d 424, 436 (S.D.N.Y. 2000); Yousefi v. Lockheed
 18 Martin Corp., 70 F.Supp. 2d 1061, 1066-67 (C.D. Cal. 1999); In re Oxford Health Plans, Inc.,
 19 Sec. Litig., 182 F.R.D. 42, 46 (S.D.N.Y. 1998). However, the aggregating of unrelated
 20 plaintiffs into a plaintiff “group” potentially results in a securities class action that is “lawyer-
 21 driven,” rather than plaintiff-driven. One of the goals of the PSLRA was to minimize these
 22 “lawyer-driven suits.” See, e.g., In re Donkenny, Inc., Sec. Litig., 171 F.R.D. 156, 157-58
 23 (S.D.N.Y. 1997) (citing H.R. Conf. Rep. No. 104-369, at *31-35 (1995), reprinted in 1995
 24 U.S.C.C.A.N 679, 730-34).

25 Some courts have stated that plaintiffs without a prior existing relationship cannot form
 26 a group or aggregate their financial stakes because that would thwart Congress' intention to
 27 prevent lawyer-driven litigation. See e.g., Aronson v. McKesson HBOC, Inc., 79 F.Supp. 2d
 28 1146, 1153 (N.D. Cal. 1999); see also In re Razorfish, Inc., Sec. Litig., 143 F.Supp. 2d 304,

1 308-09 (S.D.N.Y. 2001) (rejecting lead plaintiff group because it had "no independent
2 existence and its composite members have no prior relationship," and because there was
3 "nothing to suggest that they will collectively ride herd on counsel anywhere as well as could a
4 single sophisticated entity"); In re Telxon Corp. Sec. Litig., 67 F.Supp. 2d 803, 815-16 (N.D.
5 Ohio 1999) (noting that large group will have less incentive to exercise control over litigation,
6 particularly if group members "bear no relation and have no connection with one another
7 beyond the fact that they suffered financial loss as a result of a drop in the price of their shares
8 of stock").

9 Other courts have concluded that the collection of plaintiffs may be comprised of
10 previously unrelated persons, so long as that group is small and presumably cohesive. See
11 e.g., Weltz v. Lee, 199 F.R.D. 129, 132-33 (S.D.N.Y. 2001); In re Baan Co. Sec. Litig., 186
12 F.R.D. 214, 216-17 (D.D.C. 1999). Other courts have favored a third option in which no single
13 factor is dispositive, but which requires the group to justify and explain its composition and
14 structure in terms of adequacy to represent the class. See, e.g., In re Microstrategy Inc., 110
15 F.Supp. 2d at 435; In re Network Assocs., 76 F.Supp. 2d at 1026 (if proposed group fails to
16 explain and justify its composition and structure to the court's satisfaction, its motion should be
17 denied or modified as the court sees fit); see also Miller v. Ventro Corp., 2001 WL 34497752
18 at *7-8 (N.D. Cal., Nov. 28, 2001).

19 Although the Ninth Circuit has approved none of these options, this court favors the
20 middle approach adopted by the courts in Microstrategy, Network Associates, and Miller.
21 "This approach . . . allows a district court maximum flexibility to select a lead plaintiff who will
22 best represent the interests of the class and exercise control of the litigation." Microstrategy
23 Inc., 110 F.Supp. 2d at 435 (citations omitted). It allows the court to appoint the person or
24 persons most capable of adequately representing the interests of class members, and also
25 achieves the goal of preventing lawyers from directing the litigation by forcing the group to
26 justify its existence and explain its structure, particularly its control over the litigation. Miller,
27 2001 WL 34497752 at *8; see also In re Versata, Inc., Sec. Litig., 2002 WL 34012374 at *5-6
28 (N.D. Cal., Aug. 20, 2001) (favoring flexible "case-by-case" approach adopted by

1 Microstrategy).

2 In Microstrategy, the court concluded that a group of investors did not qualify as a lead
3 plaintiff, finding "nothing in the record to provide any assurance that the group was cohesive,
4 comprised of like-minded members, or otherwise likely to function as a unified group."
5 Microstrategy, 110 F.Supp. 2d at 437. Furthermore, the group had retained three law firms to
6 serve as co-lead counsel. From that fact, the court deduced that the group was merely "a
7 diverse collection of plaintiffs assembled by these three firms for the purpose of winning the
8 lead plaintiff role, allowing them to share the lead counsel role." Id. (citation omitted). The only
9 evidence the court could find suggesting that the group would function as a group was
10 counsel's representation that they were "cohesive," which the court found insufficient in the
11 absence of any record evidence supporting that representation. Id. (citations omitted).

12 Other courts have reached similar results. In In re Gemstar, the court refused to appoint
13 a group of unrelated investors – three institutional investors and four individual investors – as
14 lead plaintiff. 209 F.R.D. at 451-52. In In re Razorfish, the court rejected a group of unrelated
15 investors as "simply an artifice cobbled together by cooperating counsel for the obvious
16 purpose of creating a large enough grouping of investors to qualify as lead plaintiff." 143
17 F.Supp. 2d at 304. In Bowman v. Legato Sys., Inc., 195 F.R.D. 655 (N.D. Cal. 2000), the court
18 rejected a motion by six unrelated institutional and individual investors to be appointed lead
19 plaintiffs' counsel. Id. at 657. In Aronson, the court stated that the lead plaintiff must be an
20 individual person or entity, or, at most, a close-knit "group of persons." 79 F.Supp. 2d at 1154.

21 In Network Associates, Inc., Judge Alsup discussed criteria that would enable a court to
22 assess whether the proposed group is capable of performing the lead plaintiff function. 76
23 F.Supp. 2d at 1026. The proposed group should provide descriptions of its members,
24 including any pre-existing relationships among them; an explanation of how it was formed and
25 how its members would function collectively; and a description of the mechanism that its
26 members and the proposed lead counsel have established to communicate with one another
27 about the litigation. Id. (citing Amicus Curiae Brief for the SEC ("SEC Amicus Brief") at 11,
28

1 filed in Parnes v. Digital Lightwave, Inc., No. 99-11293-FF (11th Cir. Aug. 25, 1999));⁹ see
 2 also In re Lucent Techs., Inc. Sec. Litig., 194 F.R.D. 137, 151 (D.N.J. 2000) (outlining
 3 requirements similar to those the SEC suggests).

4 Nevertheless, none of the proposed groups in Network Associates was able to provide
 5 the court with any explanation or justification for the group arrangement. 76 F.Supp. 2d at
 6 1026-27. Accordingly, finding that “artificial aggregation” should never be allowed for any
 7 purpose, including to serve as lead plaintiff or to sponsor a subgroup as lead plaintiff, Judge
 8 Alsup proceeded to examine the individual plaintiffs with the goal of identifying the single
 9 candidate with the largest financial interest in the litigation, and then vetting that candidate
 10 against the requirements of the PSLRA. Id.

11 In the present case, the court concludes that neither the McNaught Group nor the
 12 Sundstrom Group can be considered the most adequate plaintiffs, as the members of each
 13 appear to be unrelated to each other in any way other than the fact that they suffered financial
 14 losses by virtue of their purchase of Silicon Storage stock. Any subsequent relationship that
 15 the members of these groups may have developed, after being introduced to each other by
 16 their lawyers, is insufficient in the court’s view to qualify them as “most adequate” lead plaintiff.

17 Looking briefly at the individual plaintiffs, the court notes that LSERS claims the next
 18 largest losses after Erickson and Lin. It is true that LSERS has been a lead plaintiff in five
 19 securities class actions during the past three years. However, the PSLRA allows the district
 20 court discretion to determine whether LSERS may nonetheless serve as lead plaintiff, where
 21 such an appointment would be “consistent with the purposes” of the statute. 15 U.S.C. § 78u-
 22 4(a)(3)(B)(vi). Moreover, the legislative history suggests that one of the factors the court
 23 should consider is whether such a plaintiff is an institutional investor. See H.R. Conf. Rep. No.
 24 104-369, 104th Cong., 1st Sess. (1995), at *34-35, reprinted in 1995 U.S.C.C.A.N. 730; see
 25 also In re Critical Path, 156 F.Supp. 2d at 1112 (PSLRA grants discretion to avoid unintended
 26 consequences of disqualifying institutional investors from serving more than five times in three
 27

28 ⁹ SEC Amicus Brief is available at <http://www.sec.gov/litigation/briefs/diglight.htm>.

1 years).

2 Accordingly, taking all the above considerations into account, the court finds that the
3 Louisiana Funds should be appointed to serve as lead plaintiff. LSERS has the single largest
4 individual loss after Erickson and Lin, and the Funds are more cohesive and have more in
5 common than the other two groups. While counsel for the Louisiana Funds did concede at the
6 hearing on the present motions that LSERS and LDARS are not operationally related and
7 have no previous joint involvement in legal actions, he also indicated that both entities are
8 state employees' retirement funds that work together from time to time on pension fund-related
9 issues in Louisiana. Moreover, as fiduciaries, both Funds are experienced in representing the
10 long-term interests of many small investors and in protecting the assets of their participants
11 and beneficiaries.

12 CONCLUSION

13 In accordance with the foregoing, the court hereby appoints the Louisiana Funds to
14 serve as lead plaintiffs in this consolidated action. The court also approves the Louisiana
15 Funds' choice of counsel – the law firm of Berman DeValerio Pease Tabacco Burt & Pucillo
16 and the law firm of Pomeranz Haudek Block Grossman & Gross LLP – to serve as lead
17 plaintiffs' counsel, with the caveat that the court anticipates that the fact that two law firms are
18 serving as lead plaintiff's counsel will not result in a duplication of services for which both firms
19 will attempt to seek compensation in the event of a settlement of the claims of the class.

20
21 **IT IS SO ORDERED.**

22 Dated: May 3, 2005

23 _____/s/
24 PHYLLIS J. HAMILTON
25 United States District Judge
26
27
28